Supreme Court, U.S.
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No. 93-344

In The

Supreme Court of the United States

October Term, 1993

RONALD O. PELLETIER,

Petitioner,

v.

GARY D. ZWEIFEL,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Respondent respectfully objects to the Questions which Petitioner asserts are presented for review in this matter, and states, instead, the following:

1. Did the Court of Appeals properly exercise its authority in reversing the decision of the district court for failure to comply with its mandate when – after this Court had denied a Petition for Writ of Certiorari filed by Petitioner and his counsel to the opinion upon which the mandate was based – the district court failed to impose sanctions as directed by the Court of Appeals for the attorneys' fees, expenses of litigation, and court costs *incurred* by Respondent established by uncontested and undisputed evidence, basing such action upon its interpretation of the mandate to require that it impose sanctions measured only by fees and expenses *actually paid* by Respondent?

LIST OF INTERESTED PERSONS

The following is a complete list of persons and entities with an interest in the outcome of this litigation:

Trial Judge:	Hon. Orinda P. Evans United States District Judge
Petitioner:	Ronald O. Pelletier
Respondent:	Gary D. Zweifel
Respondent's Counsel:	Robert E. Hicks Robert A. Bartlett Hicks, Maloof & Campbell, A Professional Corporation
Other entities with an interest:	The Law firm of Lokey & Bowden
	General Accident Insurance Company of America, Inc. Insurer for Lokey & Bowden
	Shand, Morahan & Company, Inc. Managing Underwriter for General Accident Insurance Company of America, Inc.

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OPINIONS BELOW

Petitioner has included in the Appendix to his Petition (Petitioner's App.) copies of the Opinions entered by the district court and the Court of Appeals which are pertinent to this Petition.

JURISDICTION OF THIS COURT

Respondent acknowledges that this Court has jurisdiction to consider the Petition.

STATUTES AND RULE PROVISIONS INVOLVED

In addition to the provisions of the Federal Rules of Civil Procedure cited and quoted by Petitioner, Respondent respectfully advises the Court that the following statutes and rules are also involved in this matter, the text of which, in accordance with Rule 14.1(f) & (k) of this Court, are set forth in Respondent's Appendix hereto (Respondent's App.): 28 U.S.C. § 2106 (1948); Fed. R. App. P. 38; Fed. R. Civ. P. 12(b)(6), 43, and 78; and Local Rules 220-1, and 270-1, Rules of Practice for the United States District Court for the Northern District of Georgia.

STATEMENT OF THE CASE

A. Introduction.

This is the second time which Petitioner has sought to have this Court review the action of the Eleventh Circuit Court of Appeals (hereafter the "Court of Appeals") in this case. In his first attempt (Case No. 91-3), Petitioner, joined by his counsel,[1] sought to have this

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[1] Petitioner's counsel, Herbert P. Schlanger, filed a reorganization proceeding under Chapter 11 of the Bankruptcy Code after the Petition to this Court from *Pelletier I* was filed, but before this Court ruled thereon. Respondent and the other parties interested in this matter have reached a settlement with Mr. Schlanger, and he is no longer a party to these proceedings.

Court review the Court of Appeals opinion in *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir.) ("*Pelletier I*"), *reh'g denied*, 931 F.2d 901 (11th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 167 (1991). This Court denied that Petition by Order entered on or about October 7, 1991. *Id.*

The *Pelletier I* Court conducted an extensive *plenary* and *de novo* review of the record which had been amassed in the district court – consisting of two large boxes of exhibits and nine volumes of record on appeal. Based upon such review, the *Pelletier I* Court concluded that the district court had properly granted Respondent's motions to dismiss and for summary judgment, and that Petitioner, himself a lawyer, owner of a company conducting a bar review course, and sophisticated businessman, had, with his counsel, engaged in egregious conduct in violation of Fed. R. Civ. P. 11 ("Rule 11") in the district court, and Fed. R. App. P. 38 ("App. Rule 38") on appeal, by asserting baseless claims – in bad faith and vexatiously – against Respondent. The *Pelletier I* Court further determined that the egregious nature of such conduct warranted the imposition of sanctions against Petitioner and his counsel, jointly and severally, measured by the attorney's fees, expenses of litigation, and court costs incurred by Respondent in defending himself against their baseless claims in the district court, pursuing his motion for sanctions, and opposing Petitioner's appeal to the district court's grant of his motions to dismiss and for summary judgment.

The *Pelletier I* Court remanded the matter to the district court for a determination of the amount of those fees, expenses, and costs.

In his Petition for Writ of Certiorari to this Court from *Pelletier I*, Petitioner did not contest the determinations of the Court of Appeals as to Respondent's motions to dismiss and for summary judgment, or the imposition of sanctions under App. Rule 38.

The published version of *Pelletier I* runs for 58 pages, and the recitation of the *undisputed facts* contained in the

record upon which the *Pelletier I* Court determined Petitioner's claims to be baseless and pursued in bad faith consumes 25 of those pages. *Id.* 1470-95. Moreover, those facts are also interspersed throughout the remainder of the opinion as the *Pelletier I* Court analyzed Petitioner's claims, determined them to be baseless, and explained its conclusions as to Petitioner's violations of Rule 11 and App. Rule 38 and the nature of the sanctions warranted by such conduct.

In analyzing these claims, the *Pelletier I* Court was required to sift through many subsidiary facts to ascertain that the conclusory allegations stated in Petitioner's complaint had no factual predicate, and that because of his intimate involvement in the transactions in which the claims asserted against Respondent purportedly arose, Petitioner knew his claims had no merit when he brought the complaint. A detailed examination of these subsidiary facts also revealed to the *Pelletier I* Court that Petitioner brought the complaint and pursued this action in bad faith, and for the purpose of harassing Respondent, with the hope and expectation that he would force Respondent to a quick settlement in an attempt to buy back his good name.[2]

Throughout the history of this case, the various courts which have addressed this controversy have been confronted with many impertinent and immaterial allegations from Petitioner which are irrelevant to the legal issues involved, unsupported by the record, waste valuable judicial resources, and have caused Respondent to incur fees and costs to refute. Notwithstanding that Petitioner did not initially challenge the correctness of the

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[2] A good name, of course, cannot be bought or sold. Who steals my purse steals trash; 'tis something, nothing; 'Twas mine, 'tis his, and has been slave to thousands; But he that filches from me my good name robs me of that which not enriches him, and makes me poor indeed.

Shakespeare: *Othello*, Act III, scene iii, l. 151

rulings of the *Pelletier I* Court that all his claims lacked merit either because they failed to state claims or that there were no facts to support them, Petitioner continues to assert these baseless and irrelevant allegations in his second Petition before this Court. Respondent objects to, and refutes, the allegations regarding the history of this matter which are inconsistent with the facts as determined from the record by the *Pelletier I* Court, and, instead, respectfully refers this Court to the recitation of pertinent facts in *Pelletier I* derived from the Court's *plenary* and *de novo* review of the *entire* record and the Court's observations of Petitioner's conduct on appeal.

B. Course of Proceedings and Dispositions Below.

The latest chapter in this saga began with the remand of this case from the Court of Appeals to the district court in accordance with its opinion in *Pelletier I* that the claims brought against Respondent by Petitioner were frivolous when brought, became even more so as discovery proceeded, and were intentionally brought and pursued in bad faith – 921 F.2d at 1515; and its determination that monetary sanctions pursuant to Rule 11 were appropriate and should be imposed jointly and severally against Petitioner and his counsel – 921 F.2d at 1522.

Based upon its determinations, the *Pelletier I* Court remanded the case to the district court, providing the following direction:

> With respect to the amount of the sanction, we direct the district court, upon receipt of our mandate, to award [Respondent] a sum of money that will compensate him for the attorneys' fees, litigation expenses, and costs he incurred in defending this lawsuit in the district court and in prosecuting his motion for Rule 11 sanctions. Such award shall take into account any fees, expenses, and costs [Respondent] may incur, on remand, in obtaining the award.

Id. The *Pelletier I* Court also determined that the appeal pursued by Petitioner from the district court's order

granting Respondent's motion for summary judgment was frivolous under App. Rule 38, and that Respondent was entitled to an award of fees under App. Rule 38, stating:

> We do not hesitate one whit in awarding [Respondent] double costs and a reasonable attorney's fee for opposing [Petitioner's] appeal. *See* Fed. R. App. P. 38 advisory committee note. On remand, the district court shall determine the amount of that fee and give [Respondent] judgment for the full amount thereof against [Petitioner] and [his counsel], jointly and severally.

921 F.2d at 1523.[3]

On or about April 10, 1991, after denying the motion for rehearing filed by Petitioner to that portion of *Pelletier I* pertaining to sanctions, the *Pelletier I* Court issued its mandate to the district court,[4] and on or about April 17, 1991, the district court entered an order making the mandate of the *Pelletier I* Court the judgment of the District Court.

On or about May 15, 1991, Respondent filed his amended motion for sanctions based upon *Pelletier I*, which, supported by affidavits and accompanying materials, established that as of that time, Respondent had incurred attorneys' fees, costs, and expenses in the total amount of $286,136.46. Respondent asked the District Court, in pertinent part, to enter an Order imposing sanctions upon Petitioner in the amount stated, together with such additional amounts as might be further

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[3] The *Pelletier I* Court specifically stated: "In assessing the attorney's fee, the district court shall not compensate [Respondent] for his attorney's services in prosecuting his appeal from the district court's order denying Rule 11 sanctions." *Id.* n.104.

[4] Notwithstanding the accompanying instructions as to the procedures for obtaining a stay of the mandate pending the filing of a Petition for Writ of Certiorari with this Court, Petitioner and his counsel did not seek such a stay.

incurred by Respondent in obtaining such Order, and entering a monetary judgment against Petitioner and in favor of Respondent in that amount.

On or about June 24, 1991, Petitioner filed his response to Respondent's motion for sanctions asserting that Respondent was entitled to no award of sanctions because Respondent's legal fees and expenses were actually paid by the insurance company for the law partnership of which he was a member, Lokey & Bowden, and, therefore, no fees or expenses were "incurred" by Respondent.

On or about July 9, 1991, the district court conducted a hearing on Respondent's amended motion for sanctions. During the course of that hearing, Petitioner, through his counsel, conceded that the hourly rates submitted by Respondent's counsel, and the hours expended by them in his defense, were reasonable, and also conceded the same as to the hourly rates and hours of Respondent's counsel in opposing Petitioner's appeal from the district court's grant of Respondent's motions to dismiss and for summary judgment. Petitioner also did not contest the reasonableness of the additional hours expended from and after the date of Respondent's amended motion for sanctions up to the date of said hearing, or the rates applicable thereto – the dollar value of which was $15,020.00. Instead, Petitioner reiterated his argument that since Respondent had not personally "paid" any of the attorneys' fees or expenses incurred in his defense, Respondent was not entitled to an award of those fees under the express language of *Pelletier I*.

On or about July 27, 1991, Petitioner and his counsel filed their Petition for Writ of Certiorari to this Court with respect to *Pelletier I*, and on or about October 7, 1991 this Court denied the Petition for Writ of Certiorari of Petitioner and his counsel.

On or about March 26, 1992, the district court entered an Order partially granting Respondent's amended motion for sanctions – awarding a total of $43,318.50,

jointly and severally, against Petitioner and his counsel. [Petitioner's App. 18 through 23].

In this Order, the district court acknowledged that the undisputed evidence established that the attorneys' fees, litigation expenses, and costs "necessitated by the filing of this action and the prosecution of his motion for Rule 11 sanctions amount to $282,837.96 ($267,817.96 requested in amended motion for sanctions + $15,020.00 requested in Supplemental Statement)." [Petitioner's App. 21]. The district court also acknowledged that Petitioner had offered no objection to the hourly rates requested by Respondent's counsel or the reasonableness of the hours expended, and that, in fact, Petitioner had expressly conceded that neither the hourly rate nor the hours expended were excessive. [Petitioner's App. 21].

Notwithstanding these findings, the district court interpreted *Pelletier I* to mean that the sanctions against Petitioner were to be measured only by those "actual fees which [Respondent] has paid or for which he is liable." [Petitioner's App. 21-22]. Considering the evidence that Respondent's fees were paid either by his law firm or the insurance purchased by that law firm, the district court concluded that Respondent had incurred no fees or expenses. [Petitioner's App. 22]. Nevertheless, the district court, being "mindful of . . . its obligation to implement the spirit of the Court of Appeals' directive" [Petitioner's App. 21], awarded Respondent $25,000 in sanctions against Petitioner and his counsel for their Rule 11 violations. [Petitioner's App. 23].

The district court further awarded Respondent $18,318.50 in sanctions against Petitioner and his counsel for their App. Rule 38 violations – the amount requested by Respondent – observing that Petitioner and his counsel had "not in any way contested the reasonableness of the amount of Rule 38 sanctions sought by [Respondent]." [Petitioner's App. 20].

Thereafter, Respondent and Petitioner filed timely notices of appeal to the Court of Appeals as to the district court's Order and Judgment of March 26, 1992, as well as

its later Order denying Petitioner's motion to alter or amend said judgment.

On or about March 18, 1993, the Court of Appeals issued its *per curiam* opinion reversing the March 26, 1992 Order and Judgment of the district court. *Pelletier v. Zweifel*, 987 F.2d 716 (11th Cir. 1993) ("*Pelletier II*"). In explaining its opinion in *Pelletier I*, the Court of Appeals stated, in pertinent part:

> We reversed . . . the district court's decision denying [Respondent] relief under Fed. R. Civ. P. 11, concluding that monetary sanctions were in order. *Id.* at 1521-23. We did so because [Petitioner's] claims against [Respondent] were utterly baseless. We explained that "all of the claims [Petitioner] made clearly fall below the standard of reasonableness required by Rule 11. While these claims were frivolous when made, they became even more so as discovery proceeded and it became apparent that [Petitioner's] own evidence contradicted his factual allegations. . . . " *Id.* We concluded that "[Petitioner's] complaint had no reasonable factual basis when pled and that [Petitioner] and [his counsel] knew this. When they decided to pursue this action despite their knowledge that it was frivolous, they acted in bad faith. . . . " *Id.* at 1515.
>
> . . .
>
> Because [Petitioner's] appeal was also patently frivolous, we awarded [Respondent], under Fed. R. App. P. 38, "double costs and a reasonable attorney's fee for opposing [Petitioner's] appeal." *Id.* at 1523.

987 F.2d at 716-17; Petitioner's App. 25-26.

With regard to the proceedings in the district court to determine the amount of Respondent's reasonable attorneys' fees, expenses, and costs, the *Pelletier II* Court observed:

> At the hearing convened to implement *Pelletier I*'s mandate, [Respondent] established that he

> incurred $282,837.96 in attorney's fees, litigation expenses, and costs in defending the case in the district court, and $18,318.50 on appeal. [Petitioner] and [his counsel] did not challenge the reasonableness of these amounts. Instead, they argued that [Respondent] was entitled to recover nothing because he had "incurred" no litigation expenses at all; rather, his insurance company had incurred and paid the expenses.

987 F.2d at 717; Petitioner's App. 26.

In reversing the determination of the district court, the *Pelletier II* Court, citing numerous prior decisions, concluded that the district court had misinterpreted its prior mandate and failed to carry out both its letter and its spirit, stating, in pertinent part:

> We have in this circuit a well-settled "mandate rule" obligating district courts to adhere closely to the dictates of our opinions. [cites omitted]. This rule derives from the law of the case doctrine, [cite omitted], and simply means that "a district court is not free to deviate from the appellate court's mandate." [cites omitted].
>
> . . .
>
> We neither intended nor imagined that the district court, whether at [Petitioner's] and [his counsel's] urging or on its own initiative, would meticulously parse our opinion, as they have done, to determine the meaning of our mandate. The plain language of our opinion indicates that we considered all of [Petitioner's] claims to be utterly baseless and that we intended [Petitioner] and [his counsel] to pay all of the attorney's fees, litigation expenses, and costs incurred to defend against those claims in the district court. *See Pelletier I*, 921 F.2d at 1522-23. At the very least, the palpable "spirit of the mandate," [cite omitted], demands this result. The court's sole task on remand was to determine what the fees, expenses, and costs were. *See Id.* 921 F.2d at 1522-23. In refusing to carry out this task, and, in deciding instead to fine

> [Petitioner] $25,000, the court abused the limited discretion that our mandate left to it. [cite omitted].

987 F.2d at 718 (citations, except to *Pelletier I*, omitted); Petitioner's App. 27-29.

The *Pelletier II* Court rejected the argument of Petitioner, and the determination of the district court, that because Respondent and his law firm had the foresight to purchase insurance which covered the cost of his defense, Petitioner could not be liable in sanctions for the attorney's fees, litigation expenses, and costs incurred in Respondent's defense. 987 F.2d at 718; Petitioner's App. 29.[5]

The *Pelletier II* Court concluded that because Petitioner and his counsel did not dispute Respondent's defense costs, there was nothing further for the district court to do in this matter but enter judgment in the amount established by Respondent ($301,156.46), together with interest from April 10, 1991 [the date of the mandate in *Pelletier I*], and directed the district court to do so upon receipt of its mandate. 987 F.2d at 719; Petitioner's App. 29.

On or about March 23, 1993, the district court, in accordance with the mandate of the *Pelletier II* Court, entered such judgment against Petitioner and his counsel, jointly and severally.

On or about March 23, 1993, Petitioner filed his Petition for Rehearing or Rehearing En Banc in the Court of Appeals, and on or about May 14, 1993, the Court of Appeals denied that Petition.

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[5] As explained to the Court of Appeals, Respondent and Lokey & Bowden have reached an agreement with the insurance carrier to distribute any amounts recovered as sanctions on a pro-rata basis, calculated by comparing the amount of deductible and non-recompensed attorneys' fees and expenses paid by Lokey & Bowden to the total fees and expenses paid by the insurance company.

On or about August 12, 1993, Petitioner served his Petition for Writ of Certiorari to this Court upon Respondent, and Respondent received said Petition on August 16, 1993.

C. Statement of Facts.

Given the procedural posture of this case – where the merits have been previously adjudicated and the determination of the Court of Appeals to which this Petition is directed involved only the quantification of the sanctions to be imposed against Petitioner and his counsel – Respondent submits that substantially all the facts necessary to decide this matter have been recited above.

Considering, however, that notwithstanding this Court's prior denial of his Petition for Writ of Certiorari from *Pelletier I*, Petitioner seeks to revisit the determinations of *Pelletier I*, Respondent believes that a succinct restatement of facts which supported the *Pelletier I* Court's determinations is in order.

As recited above, the *Pelletier I* Court concluded that Petitioner's complaint had no reasonable factual basis when pled, that Petitioner knew this, and that when he decided to pursue this action despite his knowledge that it was frivolous, he acted in bad faith. *See* 921 F.2d at 1515. In applying the objective standards for determining reasonableness under Rule 11,[6] and construing the evidence most favorably to Petitioner,[7] the Court stressed

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[6] *See*, for example, *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) (*en banc*); *Thomas v. Evans*, 880 F.2d 1235, 1243 (11th Cir. 1989); *Adamson v. Brown*, 855 F.2d 668, 673 (10th Cir. 1988); *White v. General Motors Corp.*, 908 F.2d 675, 680 (10th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991); and *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830-31 (9th Cir. 1986).

[7] *See*, for example, *Pelletier I*, 921 F.2d at 1497 n.7, where the Court of Appeals states: "Again for the sake of showing that Rule 11 sanctions are justified, we make these assumptions in [Petitioner's] favor."

the following facts, among others, in support of its conclusions:

– Petitioner was a lawyer skilled in the law; had been a member of the Georgia bar for nearly 10 years at the time the suit was brought; and had established a Georgia bar review course. *Id.* at 1515, 1519-20.

– Petitioner's claim that he relied on the purported promise of the president and major shareholder of the company represented by Respondent to turn over control of that company to Petitioner, and that he was defrauded by the president's alleged refusal to do so (with Respondent's purported conspiratorial assistance) "borders on the preposterous." Rather, the undisputed facts established that Petitioner expected the president to renege, and took several steps to protect himself, including: keeping his deal with the other shareholders to purchase their company stock secret from the president and Respondent; making a secret side agreement with those shareholders to control their litigation against the president and their votes as directors of the company (thereby putting himself in a position to get the president to act by his own misstatements); beginning a campaign to harass the president into submission by causing the company to go into default with its lenders, and by commencing litigation; and hiring his counsel to secretly represent Petitioner's interests while pretending to represent the other shareholders. *Id.* at 1515, 1474-79.

– Petitioner knew, well before he brought his complaint, that Respondent had not defrauded Petitioner, but, rather, had, *under the view of the evidence most favorable to Petitioner*, merely advised a client not to sign an agreement that was one-sided and had no consideration flowing to that client. *Id.* at 1516, 1474-76.

– Each count of Petitioner's original complaint was objectively frivolous when filed. *Id.* at 1517 n.91, 1495-1513.

– Petitioner was warned by the district court within several weeks after the filing of the original complaint

that he and his counsel "were treading on mighty dangerous grounds" and should acquaint themselves with Rule 11, and that the pivotal allegations of the complaint constituted nothing more than conclusions that would have to be repled. *Id.* at 1492, 1518, 1520.

– Instead of abandoning his claims, Petitioner and his counsel repled the complaint, and in doing so engaged in the same sort of "shot-gun" approach used in the original complaint, "replete with factual allegations that could not be possibly material to any of the causes of action they assert." The differences between the two complaints consisted, essentially of the expansion of the numbered paragraphs from 141 to 241, and four volumes of exhibits were attached to the amended complaint (making the document over five inches thick). The *Pelletier I* Court expressly noted that it undertook the task of deciphering the amended complaint by referring to the four volumes of exhibits, and found that none of the claims had merit. *Id.* at 1517-19.

– In addition to the admonition from the district court, an independent special counsel appointed by the bankruptcy court in the company's bankruptcy case to examine into claims which Petitioner sought to have assigned to him, and which were substantially identical to those being pursued in this case, concluded that the possibility of litigation sanctions against the bankruptcy estate, including Rule 11 sanctions, were sufficiently great not to allow the undertaking of such claims, and the bankruptcy court concurred in such report after a hearing attended by Petitioner – yet instead of abandoning his claims, Petitioner continued to press them. *Id.* at 1493-94, 1516.

– Petitioner failed to call to the attention of the *Pelletier I* Court the ruling in the Georgia Court of Appeals that Petitioner never became a stockholder of the company. This failure to disclose was also cited by the *Pelletier I* Court as a ground for imposing sanctions against Petitioner and his counsel under App. Rule 38 [an

action about which Petitioner did not complain in his first Petition]. *Id.* at 1510-11, 1521, 1523.

Based upon these and other actions of Petitioner – who was himself a participant in the transactions in which he falsely claimed that Respondent had committed serious acts of criminal misconduct – the *Pelletier I* Court concluded that Petitioner's claims had no basis in fact, and that they were brought in bad faith, vexatiously, and for the improper purpose of harassing Respondent to extract a settlement from him. *Id.* at 1515, 1517.

REASONS FOR DISALLOWANCE OF THE WRIT

A. The *Pelletier I* Court Properly Concluded that Petitioner had Committed Egregious Violations of Rule 11 and App. Rule 38, and Properly Determined the Nature of the Sanctions to be Imposed Upon Petitioner for Those Violations – Remanding The Matter to the District Court for a Determination of the Amount of Those Sanctions.

The essence of Petitioner's argument is that the *Pelletier I* Court should not have determined the nature of the sanctions to be imposed, but, rather, should have remanded the matter to the district court to give that court another opportunity to take evidence of "mitigating circumstances" that could, according to Petitioner, have some impact upon the amount of the sanctions to be imposed against him. In support of this argument, Petitioner cites to several cases which he contends support his position. In making this argument, however, Petitioner glosses over several factors which establish that this case is not in conflict with the cases cited by him, and that based upon the specific factual context of this case, those cases are distinguishable.

The *Pelletier I* Court reviewed Petitioner's appeal from the district court's grant of summary judgment for Respondent using a standard of review which was *plenary* and *de novo*, employing the same legal standard as used

in the district court – whether Respondent was entitled to judgment as a matter of law based upon the material facts as to which there was no genuine dispute. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986); *Mercantile Bank & Trust v. Fidelity & Deposit Co.*, 750 F.2d 838, 841 (11th Cir. 1985); *Carlin Communication v. Southern Bell*, 802 F.2d 1352 (11th Cir. 1986).

The *Pelletier I* Court conducted a similar *plenary* and *de novo* review of the district court's dismissal of certain of Petitioner's claims under Fed. R. Civ. P. 12(b)(6), again employing the same legal standard as used by the district court – whether it appeared beyond doubt that Plaintiff could prove no set of facts in support of his claims that would entitle him to relief. *Harris v. Kerner*, 404 U.S. 519, 520-21 (1972); *Wright v. Newsome*, 795 F.2d 964 (11th Cir. 1986). Since discovery had been completed, and a substantial factual record had been developed which contained the purported factual predicate for Petitioner's claims, the legal standard for the review of the district court's grant of summary judgment was also applicable to these claims. *Celotex*, 477 U.S. at 322-25; *Ross v. Bank South*, 837 F.2d 980, 998-99 (11th Cir. 1988).

Using these standards in conducting a thorough and sifting review of the *entire* record, after reading Petitioner's complaint "in the light most favorable to him, with respect to the claims dismissed under Fed. R. Civ. P. 12(b)(6), and giving him the benefit of every reasonable inference, with respect to the claims disposed of on summary judgment under Fed. R. Civ. P. 56," 921 F.2d at 1470, the *Pelletier I* Court affirmed the district court's grant of Respondent's motions to dismiss and for summary judgment, and concluded that Petitioner's claims had no merit.

Having failed to challenge this determination by the *Pelletier I* Court in his earlier Petition for Writ of Certiorari, Petitioner now asserts that the district court's initial grant of summary judgment to Respondent, and the *Pelletier I* Court's affirmance of the district court's grant were erroneous. Respondent, respectfully referring

this Court to the extraordinarily detailed analysis of the record necessitated by Petitioner's appeal from the district court's grant, submits that under the criteria for weighing the sufficiency of the undisputed evidence in connection with a motion for summary judgment as espoused by this Court in *Celotex*, 477 U.S. at 322-25, Petitioner's belated assertion has no merit.[8]

In considering Respondent's cross-appeal from the district court's denial of his motions for sanctions, the *Pelletier I* Court, citing this Court's opinion in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990), acknowledged that it should apply an abuse of discretion standard in reviewing all aspects of the district court's Rule 11 determinations, and that it could reverse the district court only if it found that the district court had abused its discretion. *Id.* at 1514.

In *Cooter & Gell*, this Court observed that the issues involved in determining whether Rule 11 has been violated involve "fact-intensive close calls," and if a Court of Appeals, using a deferential standard, concluded that a district court had relied upon a materially incorrect view of the law or had based its findings on an erroneous view of the law, then the Court of Appeals would be justified in setting aside the district court's ruling. 496 U.S. at 402.[9]

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[8] Moreover, considering that Petitioner did not raise these grounds of objection to *Pelletier I* in his first Petition, if this Court had granted that Petition, under a long line of authority, it is unlikely that this Court would have considered them. *See, for example, F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 121 n6 (1974); *Taylor v. Freeland & Kronz*, ___ U.S. ___, 112 S. Ct. 1644, 118 L. Ed. 2d 280, 288-89 (1992). This Court should not entertain Petitioner's belated effort to raise them now.

[9] In emphasizing the benefit of this deferential rule, this Court stressed that giving the district court the discretion to resolve questions involving "multifarious, fleeting, special, narrow facts that utterly resist generalization" in the Rule 11 context would "streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and

The *Pelletier I* Court, using the deferential standard set forth in *Cooter & Gell*, and having the *entire record* of this case before it, determined that the district court had abused its discretion in failing to conclude that Petitioner's conduct violated Rule 11, because it based its ruling on an erroneous view of the law and on a clearly erroneous view of the evidence. *Id.* at 1514. In so concluding, the *Pelletier I* Court observed that the district court had failed to conduct a searching inquiry into the merits of Petitioner's complaint, and as a result of such failure, the district court developed a clearly erroneous view of the evidence. *Id.*, *Cooter & Gell*, 496 U.S. at 402.

None of the matters decided by the district court which were reviewed by the *Pelletier I* Court required the determination of credibility or the weighing of the sufficiency of evidence; and the issues before the *Pelletier I* Court, and the record upon which those issues were based, were identical to what had been before the district court. Indeed, the *Pelletier I* Court was in an even better position than the district court in assessing Respondent's motion for sanctions, since the district court, out of procedural necessity, had to take up piece-meal and *seriatim* the various motions in this case which were, instead, presented to the *Pelletier I* Court in consolidated fashion.

. Using the comprehensive knowledge which it had gained from its own *plenary* and *de novo* review of the entire record of this case, the *Pelletier I* Court concluded that Petitioner's complaint had no reasonable factual

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reconsidering facts already weighed and considered by the district court; it will also discourage litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation." 496 U.S. at 404.

Unfortunately, in this case the pursuit by Petitioner of his appeal from the district court's grant of Respondent's motions to dismiss and for summary judgment multiplied, rather than reduced, the underlying litigation; and the failure of the district court to apply the proper discretionary standards to Petitioner's conduct, has spawned, rather than reduced, satellite litigation.

basis when pled, that Petitioner knew this, and that when he decided to pursue this action despite his knowledge that it was frivolous, he acted in bad faith. *Id.* at 1515. Respondent respectfully submits that based upon the undisputed material facts which were in the *Pelletier I* Court, and applying the deferential standard for review of the district court prescribed by *Cooter & Gell*, 496 U.S. at 402, the Court of Appeals correctly decided these matters. The *Pelletier I* Court was perfectly capable of determining not only that the district court should have imposed sanctions upon the Petitioner, but also the appropriate form that those sanctions should take – the attorneys' fees, expenses of litigation, and costs incurred by Respondent resulting from the bad faith pursuit of Petitioner's baseless claims.

The cases cited by Petitioner in support of his argument that the Court of Appeals should not have determined the nature of the sanction appropriate for his conduct in this case, or that the Court of Appeals should have remanded the case to the district court to allow further evidence in "mitigation" of this sanction, do not refute the use of monetary sanctions for deterrence; indeed, those cases support such use. *See, for example, Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 193 (3d Cir. 1988); *In re Kunstler*, 914 F.2d 515, 522-23 (4th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1607 (1991); *Stewart v. American Intern. Oil & Gas Co.*, 845 F.2d 196, 201-02 (9th Cir. 1986); *In re Yagman*, 796 F.2d 1165, 1184-85, *amended* 803 F.2d 1085 (9th Cir. 1986), *cert. denied*, 484 U.S. 963 (1987); *White v. General Motors Corp.*, 908 F.2d at 683-84.

Indeed, in cases such as this, involving frivolous allegations of criminal misconduct under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"), sanctions measured by the attorneys fees and costs incurred by the defendants have been upheld by those Courts of Appeal considering the matter. *See for example Avirgan v. Hull*, 932 F.2d 1572, 1581-83 (11th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 913,

and *cert. denied*, ___ U.S. ___, 113 S. Ct. 405 (1992) (sanctions for bad faith filing and prosecution of RICO case awarded in the amount of $1,034,381.36 for defendants attorneys' fees and costs of litigation); *Brandt v. Schal Assocs., Inc.*, 960 F.2d 640 (7th Cir. 1992) (sanctions for bad faith filing and prosecution of RICO case awarded in the amount of $443,564.66 for defendants attorneys' fees and costs of litigation).

Moreover, it is clear that if the circumstances warrant, monetary sanctions measured by the attorney's fees and litigation expenses incurred by the opposing party are appropriate sanctions under Rule 11. *Donaldson v. Clark*, 819 F.2d 1551, 1556-58 (11th Cir. 1987) (en banc); *Cooter & Gell*, 496 U.S. at 393. *See also Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978), applying this concept to an award of attorney's fees in Title VII cases; *Chambers v. NASCO*, ___ U.S. ___, 111 S. Ct. 2123, 2139, *reh'g denied*, ___ U.S. ___, 112 S. Ct. 12 (1991), applying this concept to an award of attorney's fees made under a federal court's inherent powers.

In *Pelletier I*, the Court devoted approximately 19 printed pages to its analysis of the Rule 11 issues. 921 F.2d 1513-22. Based upon its *plenary* and *de novo* review of the record, the *Pelletier I* Court concluded that:

> . . . [Petitioner's complaint had no reasonable factual basis when pled and that [Petitioner] and [his counsel] knew this. When they decided to pursue this action despite their knowledge that it was frivolous, they acted in bad faith; they simply demanded from [Respondent] the redress they had sought and failed to obtain from [the company's president] on similar meritless claims.

Id. at 1515. As to the particular culpability of Petitioner for sanctions, the *Pelletier I* Court stated:

> In deciding whether [Petitioner] has prosecuted this case in bad faith, we have rejected the thought that his two complaints, and his briefs to us, might be the product of incompetent lawyering, and thus excusable, rather than the tools

> of harassment. We have done so because [Petitioner] is skilled in the law, and, moreover, had been warned (through [his counsel]) by a bankruptcy judge and a United States district judge that if he continued to pursue [Respondent], and his law firm, he was likely to run afoul of Rule 11.

Id. at 1519-20. After making additional observations regarding Petitioner's specific conduct, the *Pelletier I* Court concluded:

> Monetary sanctions plainly are warranted in this case. All of the claims [Petitioner] made clearly fall below the standard of reasonableness required by Rule 11. While these claims were frivolous when made, they became even more so as discovery proceeded and it became apparent that [Petitioner's] own evidence contradicted his own factual allegations.
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> . . .
>
> We think that imposing sanctions in this case would serve the dual purpose of deterring the filing of frivolous claims and defenses while not chilling attorneys' legitimate enthusiasm and creativity in advancing legal and factual theories. At a time when the federal courts – which are a scarce dispute resolution resource, indeed – are straining under the pressure of an ever-increasing caseload, we simply cannot tolerate this type of litigation. Particularly with regard to civil RICO claims, plaintiffs must *stop and think* before filing them. If used correctly, the civil RICO provisions may have many salutary effects. When used improperly, as in this case, those provisions allow a complainant to shake down his opponent, and, given the expense of defending a RICO charge, to extort a settlement. Such improper use of the civil RICO provisions comes at the expense of the federal judiciary and those who need ready access to the courts.

Id. at 1521-22. It was in this context that the *Pelletier I* Court observed:

> We need not remand the Rule 11 issues to the district court for further consideration under a proper application of the law. The record before us demonstrates beyond any question that Rule 11 sanctions are in order, what the sanctions should be as a minimum, and that [Petitioner] and [his counsel] should be liable for them jointly and severally.

Id. at 1514 n.87. As this Court observed in *Hutto v. Finney*, 437 U.S. 678 (1978), an award of attorneys' fees based upon bad faith litigation tactics "vindicates judicial authority without resort to more drastic sanctions available for contempt of court and makes the prevailing party whole for expenses caused by his opponent's obstinacy." *Id.* at 688 n.14. *See also Brandt v. Schal Assocs. Inc.*, 960 F.2d at 646 ("[D]eterence may well include the payment of expenses and attorneys' fees generated as a result of the filing of abusive litigation.").

28 U.S.C. § 2106, provides, in pertinent part, that this Court and the Court of Appeals have the power to reverse any judgment or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate order or judgment or require such further proceedings as may be just under the circumstances. This authority has been interpreted by this Court and the Court of Appeals to include the power, in a case before an appellate court on undisputed facts where the appellate court is in the same position as would be the court below, to resolve an issue which was not decided below due to the lower court's erroneous determination of a preliminary issue, and to dispense with the need for further evidentiary hearings if no legitimate purpose would be served thereby. *See, for example, Hormel v. Helvering*, 312 U.S. 552, 556-57 (1940); *Perkins v. Matthews*, 400 U.S. 379, 386 (1971); *Moses H. Cone Hosp. v. Mercury Constr.*, 460 U.S. 1, 29 (1983); *Forman v. United States*, 361 U.S. 416, 425, *reh'g denied*, 362 U.S. 937 (1960), *overruled on other grounds, Burks v. United States*, 437 U.S. 1 (1978); *Steinfeld v. Zeckendorf*, 239 U.S.

29, 30 (1915); *Joshi v. Florida State Univ. Health Ctr.*, 763 F.2d 1227, 1236 (11th Cir. 1985); *Wheeler v. City of Pleasant Grove*, 896 F.2d 1347, 1351 (11th Cir. 1990).

Considering the egregious facts and circumstances of Petitioner's Rule 11 violations as determined by the Court of Appeals from its review of the *undisputed material facts* of record, the *Pelletier I* Court was authorized to determine that the appropriate sanction to be imposed upon Petitioner was to reimburse Respondent for the attorney's fees, expenses of litigation, and court costs incurred by him in his defense in the district court and in the pursuit of his motion for sanctions.

In challenging the *Pelletier I* Court's determinations regarding sanctions, Petitioner also glosses over the fact that when this matter was initially before the district court on Respondent's motion for sanctions, Petitioner failed to submit any evidence in mitigation, as required by applicable procedural rules.[10] If the district court had

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[10] Under Local Rules 270-1 and 220-1 of the United States District Court for the Northern District of Georgia, which are reprinted in the Appendix hereto, a party against whom a motion seeking attorney's fees has been filed must respond in writing within ten (10) days after the service of that motion, and failure to file a response indicates that there is no opposition to the motion. Local Rule 270-1 on the determination of attorney's fees refers to and incorporates the applicable provisions of Fed. R. Civ. P. 43(e), and Fed. R. Civ. P. 78, and reading these various rules in *pari materia* establishes that a party against whom attorney's fees are sought must present evidence in opposition thereto in the form of affidavits or live testimony, depending upon how the court considers the matter. The district court considered Respondent's motion for sanctions on the written submissions of the parties, which included affidavits submitted by Respondent to establish the reasonableness of the attorney's fees incurred in his defense, and a brief from Petitioner which did not address the "mitigating circumstances" he now claims an entitlement to present. Petitioner's brief was previously submitted to this Court as a part of Respondent's opposition to Petitioner's first Petition for Writ of Certiorari.

ruled, in the first instance, in the manner which the *Pelletier I* Court concluded was required by the undisputed evidence of record, then Petitioner, having had both the opportunity and the obligation to present such matters to the district court, surely would not have been heard to complain that he did not have his day in court. Since the *Pelletier I* Court merely performed the function which the district court should have performed, but failed to, using the same record and the same *undisputed material facts* which were available to the district court, including Petitioner's response to Respondent's motion for sanctions, Petitioner was not deprived of an opportunity to present matters to the district court, he merely failed to present any such matters.

Moreover, when this matter was before the district court on remand, it was only Petitioner's counsel, who, on his own behalf, sought to have the district court consider evidence of his changed financial circumstances resulting from his own Chapter 11 reorganization petition. Neither Petitioner's counsel, nor Petitioner on his own behalf, sought to have the district court consider evidence of Petitioner's financial circumstances. *See*, Plaintiff's Counsel's Motion for an Evidentiary Hearing and for a Re-Determination of the Appropriate Sanction to be Imposed Pursuant to Rule 11, and Memorandum in Support Thereof, which are reprinted in the Appendix hereto.

Respondent respectfully submits that under the fact specific circumstances of this case, the Court of Appeals had the authority to weigh and consider the *undisputed material facts* before it in connection with its *plenary* and *de novo* review on related matters in determining the proper sanction, rather than sending the case back to the district court for yet another round of "satellite litigation."

B. The Court of Appeals Properly Reversed the District Court Decision Which Failed to Impose Sanctions as Directed by the Mandate of *Pelletier I*.

In challenging the determinations of *Pelletier II*, Petitioner argues that it was erroneous for the same panel which decided *Pelletier I* to consider whether the district court properly interpreted its mandate.

The *Pelletier II* Court, citing several earlier opinions of the Eleventh Circuit Court of Appeals, based its decision to reverse the district court on the "well-settled 'mandate rule' obligating district courts to adhere closely to the dictates of our opinions." 987 F.2d at 718.[11] The *Pelletier II* court also observed that all circuits have a similar rule. *Id.*[12]

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[11] *See Baumer v. United States*, 685 F.2d 1318, 1321 (11th Cir. 1982); *United States v. Williams*, 728 F.2d 1402, 1405-6 (11th Cir. 1984); *Dorsey v. Continental Casualty Co.*, 730 F.2d 675, 678-79 (11th Cir. 1984); *Westbrook v. Zant*, 743 F.2d 764, 770 (11th Cir. 1984); *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1440 & n.2 (11th Cir. 1984); *Piambino v. Bailey*, 757 F.2d 1112, 1119 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); *Litman v. Massachusetts Mut. Life Ins. Co.*, 825 F.2d 1506, 1511 (11th Cir. 1987) (en banc), *cert. denied*, 484 U.S. 1006 (1988); *Barber v. International Bhd. of Boilermakers*, 841 F.2d 1067, 1070 (11th Cir. 1988).

[12] *See, for example, United States v. Iriarte*, 166 F.2d 800 (1st Cir.), *cert. denied*, 335 U.S. 816 (1948); *Crane Co. v. American Standard, Inc.*, 490 F.2d 332 (2d Cir. 1973); *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943 (3d Cir. 1985); *Stamper v. Baskerville*, 724 F.2d 1106 (4th Cir. 1984); *Todd Shipyards Corp. v. Auto Transp., S.A.*, 763 F.2d 745 (5th Cir. 1985); *In re United States Steel Corp.*, 479 F.2d 489 (6th Cir.), *cert. denied*, 414 U.S. 859 (1973); *Devines v. Maier*, 728 F.2d 876 (7th Cir.), *cert. denied*, 469 U.S. 836 (1984); *Poletti v. Commissioner*, 351 F.2d 345 (8th Cir. 1965); *In re Beverly Hills Bancorp.*, 752 F.2d 1334 (9th Cir. 1984); *Cherokee Nation v. Oklahoma*, 461 F.2d 674 (10th Cir.), *cert. denied*, 409 U.S. 1039 (1972); *City of Cleveland v. Federal Power Comm'n*, 561 F.2d 344 (D.C. Cir. 1977).

This Court, as well, has long recognized the "mandate rule" in cases before it. *See, for example, In re Sanford Fork & Tool Co.*, 160 U.S. 247 (1895), in which this Court stated its rule as follows:

> When a case has been once declared by this court on appeal and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. [cite omitted]. If the circuit court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this court. [cites omitted]. . . . The opinion delivered by this court at the time of rendering its decree may be consulted to ascertain what was intended by its mandate; and either upon an application for writ of mandamus, or upon a new appeal, it is for this court to construe its own mandate, and to act accordingly. [cites omitted].

Id. at 255-56. *See also Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), and *Magwire v. Tyler*, 84 U.S. (17 Wall.) 253 (1873), which hold that upon considering a case after a prior mandate, this Court has the power to either remand the case or, alternatively, proceed to final judgment and award judgment to the prevailing party.[13]

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[13] *See also* the following cases of this Court which established or confirm the rule that this Court has the authority to interpret its prior mandate to determine whether a lower court

The *Pelletier II* Court, in reviewing the decision of the district court's action upon the mandate of *Pelletier I*, performed exactly the same function at the Circuit Court level that this Court described in *In Re Sanford Fork & Tool* – that is, upon a new appeal from the decision based upon its mandate, it construed its own mandate and acted accordingly. Furthermore, in accordance with its authority as provided by 28 U.S.C. § 2106, as confirmed by the cases construing same, the *Pelletier II* Court properly exercised its power and authority to direct the entry of judgment by the district court in accordance with its mandate.

Petitioner contends that the panel of the Court of Appeals which decided *Pelletier I* should be precluded from reviewing the decision of the district court acting upon the mandate issued by it, and should not be allowed to construe the meaning of its earlier mandate. In making this contention, Petitioner asserts that the panel in *Pelletier I* acted as a "fact-finder," and that its statements in connection with its determinations that Petitioner committed egregious violations of Rule 11 and App. Rule 38 created the appearance that they were no longer "neutral, impartial administrator[s] of justice."

As discussed in great detail above, the *Pelletier I* Court conducted a *plenary* and *de novo* review of the *entire* record amassed in the district court using a standard of review which was deferential to the positions of Petitioner in resisting Respondent's motions for summary

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properly interpreted and acted thereon; and to take appropriate action by way of reversal or the issuance of a writ of mandamus if it is determined that the lower court acted improperly: *Sibbald v. United States*, 37 U.S. (12 Pet.) 488, 493-95 (1838); *West v. Brashear*, 39 U.S. (14 Pet.) 51, 54-55 (1840); *In Re Dubuque & P.R. Co.*, 68 U.S. (1 Wall.) 69 (1863); *Wayne County Suprs. v. Kennicott*, 94 U.S. 498 (1876); and *Gaines v. Caldwell*, 140 U.S. 228, 238-40 (1892); *In re Potts*, 166 U.S. 263, 265-66 (1896); *United States v. U.S. Dist. Court*, 334 U.S. 258, 263-64 (1948); *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 424, 427-28 (1978).

judgment and to dismiss, and deferential to the Petitioner and the district court in reviewing the district court's denial of Respondent's motion for sanctions.

It is clear from the size of the record (two large boxes of exhibits and nine volumes of the record on appeal), the length of time which the *Pelletier I* Court considered the matter (over 13 months from oral argument to the date of decision), and the breadth and scope of its opinion (over 58 pages in the published version), that the *Pelletier I* Court gave careful and complete consideration to this matter. Furthermore, as the *Pelletier I* Court stressed that in reviewing the extensive record and the *undisputed facts* set forth therein, it construed the evidence most favorably to Petitioner.[14] In so doing, it was led to the inescapable conclusion that Petitioner's claims were baseless, were known to be so by Petitioner when brought, and were brought by Petitioner in bad faith and for the improper purpose of harassing Respondent into an *in terrorem* settlement. The opinions formed by the *Pelletier I* Court were based upon its extensive knowledge of the facts in which it was required to become immersed in large measure to determine whether, as asserted by *Petitioner*, the district court had erroneously granted summary judgment to Respondent.

Even if a court's analysis of a matter properly before has caused it to express vigorous views about the law or the conduct of the parties, such circumstance does not disqualify a court from later participation in that matter. As stated by this Court in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), where this Court, called upon to determine whether a district judge who expressed strong views as to a case before him should be disqualified due to bias and prejudice, stated, in pertinent part:

> The alleged bias and prejudice must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.

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[14] *See*, footnote 7, above.

> [cite omitted]. Any adverse attitudes that [the Judge] evinced toward the defendants were based on his study of the depositions and briefs which the parties had requested him to make. What he said reflected no more than his view that, if the facts were as the Government alleged, stringent relief was called for.

Id. at 583. *See also Hepperle v. Johnson*, 590 F.2d 609, 614 (5th Cir. 1979) ("Appellant's grievance against members of this court concerns only judicial conduct: he complains of prior rulings by the court. Such allegations are insufficient grounds for disqualification [cites omitted]."); *United States v. Barry*, 961 F.2d 260 (D.C. Cir. 1992) (remarks reflecting even strong views about a defendant will not call for a judge's recusal so long as those views are based upon his own observations during the performance of his judicial duties); *Garver v. United States*, 846 F.2d 1029 (6th Cir. 1988) (it would be a great disservice to imply that a vigorous expression of views on a subject appropriately before a judicial tribunal can become evidence of judicial bias).

It would be a greater disservice if an appellate panel which issued a mandate to district court were to be precluded from reviewing the decision of the district court interpreting that mandate. Indeed, if such were the rule in this Court, there could be no review on appeal from an interpretation of a previously issued mandate. Such a rule at the circuit court level would perhaps be technically possible as to panel opinions, but what would happen in the event of a decision rendered *en banc*? Furthermore, what legitimate purpose would be served by having such a rule?

Respondent respectfully submits that Petitioner's plea for a panel different from that which decided *Pelletier I* is simply a request to "forum shop" in a vain hope of obtaining a different result from that which the undisputed facts and the law clearly demanded. This argument, as his others, should be summarily rejected by this Court.

C. Due to the Fact Specific Nature of this Matter, This Court Should Not Consider This Case on Certiorari.

As with his Petition to this Court from *Pelletier I*, Petitioner's arguments are based upon his assertions that the Court of Appeals erroneously viewed the *undisputed material facts* while conducting its own *plenary* and *de novo* review of the massive record amassed in the district court. Indeed, it was based upon this review that the *Pelletier I* Court reached its conclusions that the district court erred in not imposing sanctions against Petitioner because it had failed to conduct a searching inquiry into the merits of Petitioner's complaint, and, as a result, developed a clearly erroneous view of the evidence. 921 F.2d at 1514; *Cooter & Gell*, 496 U.S. at 402.

According to Petitioner, *Pelletier II*'s interpretation of the mandate of *Pelletier I* was impermissibly tainted by an "erroneous" view of the evidence. If this Court were to review the *Pelletier I* or *Pelletier II* decisions, it would be required to conduct its own thorough and sifting review of those facts, because the determination of the Court of Appeals as to the severity of the conduct warranting sanctions, and the proper sanction to be imposed for such conduct, are integrally entwined in the facts.

Historically, this Court has refrained from granting certiorari to review evidence and discuss specific facts, or the inferences from the evidence. *See*, for example, *United States v. Johnston*, 268 U.S. 220, 227 (1925); *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178 (1938). Respondent respectfully submits it should also decline to do so in this case.

CONCLUSION

As a result of Petitioner's continuing efforts to avoid the consequences of his own conduct which *Pelletier I* concluded was an "improper use of the civil RICO provisions" in an attempt to "shake down" an opponent and

"extort a settlement" at the "expense of the federal judiciary and those who need ready access to the courts," 921 F.2d at 1522, Respondent has continued to be embroiled in this litigation, because the district court, apparently inveigled by Petitioner's sophistry, failed to adhere to the clear mandate of *Pelletier I*. Referring back to the analysis of *Pelletier I*, and the factual predicate and legal basis upon which Petitioner's responsibility for sanctions and the nature of those sanctions were determined, *Pelletier II* corrected the district court's error making use of the undisputed and uncontested evidence of the reasonable attorney's fees, expenses of litigation, and court costs presented to the district court. The action of the Court of Appeals in reviewing the meaning of its mandate and the failure of the district court to act properly thereon was appropriate and correct. Considering the fact specific nature of this case, it is not an appropriate candidate for *certiorari*. This Court should deny Petitioners' writ.

Respectfully submitted,

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Appendix

STATUTES AND RULE PROVISIONS INVOLVED App. 1

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Plaintiff's Counsel's Motion for an Evidentiary Hearing and for a Re-Determination of the Appropriate Sanction to be Imposed Pursuant to Rule 11, and Memorandum in Support Thereof ..... App. 6

STATUTES AND RULE PROVISIONS INVOLVED

28 U.S.C. § 2106 (1948):

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Fed. R. App. P. 38:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages, and single or double costs to the appellee.

Fed. R. Civ. P. 12(b)(6):

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . A motion making any one of these defenses shall be made before pleading if a further pleading is permitted. . . .

Fed. R. Civ. P. 43(e):

> **(e) Evidence on Motions.** When a motion is based on facts not appearing of record the court may hear the matters on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition.

Fed. R. Civ. P. 78:

> Unless local conditions make it impracticable, each district court shall establish regular times and places, at such intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge may at any time or place and on such notice, if any, as the judge considers reasonable may make orders for the advancement conduct, and hearing of actions.
>
> To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

Rule 220-1, Local Rules of Practice for the United States District Court for the Northern District of Georgia – Filing of Motions and Responses; Hearings:

> **(a) Filing of Motions.**
>
> (1) Every motion presented to the clerk for filing shall be accompanied by a memorandum of law citing supporting authorities and, when allegations of fact are relied upon, by supporting affidavits. Motions not in conformance with this rule shall not be accepted for filing.
>
> (2) Specific filing times for some motions are set forth below. All other motions must be filed WITHIN 100 DAYS after the complaint is filed, unless the filing party has obtained prior permission of the Court to file later.

(b) Response to Motion.

(1) Each party opposing a motion shall serve his response, responsive memorandum, affidavits, and any other responsive material not later than ten days after service of the motion, except that in Cases of motion for summary judgment the time shall be twenty days after the service of the motion. Failure to file a response shall indicate that there is no opposition to the motion.

(2) Although a reply by the movant shall be permitted, it shall not be necessary for the movant to file a reply as a routine practice. When the movant deems it necessary to file a reply brief, that brief shall be served not later than ten days after service of the responsive pleading. No further briefs may be filed by the parties, except upon order of the Court.

(c) Hearings. All motions shall be decided by the Court without oral hearing unless a hearing is ordered by the Court.

Rule 270-1, Local Rules of Practice for the United States District Court for the Northern District of Georgia – Attorney's Fees – Procedure for Determination:

If a final judgment, including a judgment made final under F. R. Civ. P. 54(b), does not determine (or establish the procedures for determining) the amount of attorney's fees which are authorized by federal statute to be awarded by the Court to or on behalf of a prevailing party or which may be sought under the equitable or inherent powers of the Court, the following procedures shall apply:

(1) The award of such fees (and expenses incident thereto not ordinarily allowable as taxable costs) shall be requested by special written motion addressed to the Court and shall not be included in a cost bill, in a motion for taxation or retaxation of costs, or in a motion under F. R.Civ.P. 50(b), 52(b), or 59.

(2) The motion shall be filed with the Clerk of Court and, in accordance with Rule 5, Federal Rules of Civil Procedure, shall be served upon the parties against whom the award is sought at least 10 days prior to the expiration of the time within which such opposing parties can file a timely notice of appeal from the judgment under Rule 4(a)(1, 3-6), Federal Rules of Appellate Procedure.

(3) The motion shall specify the judgment and the statute or other grounds on this basis of which entitlement to the award is claimed and shall state the amount (or provide a fair estimate of the approximate amount) of the fees and expenses sought. Within 30 days (or such other period as the Court may prescribe) after filing the motion, the movant shall file and serve a detailed specification and itemization of the requested award, with appropriate affidavits and other supporting documentation.

(4) Hearings on the motion shall be conducted by the Court in accordance with F. R. Civ. P. 43(e) and F. R. Civ. P. 78 and in accordance with applicable statutory and decisional standards and principles.

(5) Pendency of a motion filed under this rule does not extend the time for appealing from, or for filing a motion under F. R. Civ. P. 50(b), 52(b), or 59 directed to the judgment giving rise

to the claim for attorney's fees. The Court may, however, take the motion into consideration in ruling upon a motion for extension of time for appealing filed under F. R. A. P. 4(a)(5).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RONALD O. PELLETIER,
Plaintiff

v.

GARY D. ZWEIFEL,
Defendant

Civil Action
Number
1:86-CV-156-ODE

PLAINTIFF'S COUNSEL'S MOTION FOR AN EVIDENTIARY HEARING AND FOR A RE-DETERMINATION OF THE APPROPRIATE SANCTION TO BE IMPOSED PURSUANT TO RULE 11

Herbert P. Schlanger, counsel for plaintiff, hereby moves this Court for an order setting a hearing at which he may present testimony and evidence concerning the changes in circumstances, occurring since January, 1991, relating to the deterrent effect that issuance of the Court of Appeals' opinion in this matter has had on him and of his financial circumstances and ability to pay any monetary sanction. Counsel further moves this Court for an order, following the hearing, re-examining and re-determining the appropriate sanction to be imposed pursuant to Rule 11, Fed.R.Civ.P.

A memorandum in support of this motion is appended hereto.

Respectfully submitted this 4th day of February, 1992.

/s/ Herbert P. Schlanger
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Attorney for plaintiff

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RONALD O. PELLETIER,
Plaintiff

v.

GARY D. ZWEIFEL,
Defendant

Civil Action Number
1:86-CV-156-ODE

PLAINTIFF'S COUNSEL'S MEMORANDUM IN SUPPORT OF HIS MOTION FOR AN EVIDENTIARY HEARING AND REGARDING THE APPROPRIATE SANCTION TO BE IMPOSED PURSUANT TO THE PROVISIONS OF RULE 11[1]

[1] Plaintiff has not abandoned his earlier arguments concerning the appropriate amount of sanctions to be imposed. This motion and memorandum is made in order to suggest to the Court an alternative basis for any order it may enter.

1. Earlier determination not binding

Because of intervening changes in circumstances,[2] the Court of Appeals' determination of the nature of the appropriate sanction to be imposed on plaintiff and his counsel (and of its measure) is no longer binding on this Court.[3] It is a longstanding principal of law that changes in the underlying facts and circumstances which are material to litigation, occurring during the litigation, may render non-binding earlier determinations based on those facts. *See, e.g., Pyramid Life Ins. Co. v. Curry*, 291 F.2d 411, 414 (8th Cir., 1961) ("The law of the case rule does not apply if the evidence on the later trial is substantially different from that on the former trial.")[4]

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[2] As this Court is aware, plaintiff's counsel has filed a bankruptcy petition. This was caused, at least in significant measure, by the existence of the Court of Appeals' opinion in this case.

[3] The Court of Appeals' determination that *some* sanction should be imposed is, of course, still binding. It is only the nature and scope of that sanction which may now be redetermined by this Court.

[4] Since the Court of Appeals in this case was without benefit of any evidence of the deterrent effect of *any* sanction, and since it was without benefit of any evidence of the effect that imposition of monetary sanctions would have (and the mere possibility of which *has* had) on counsel, factual determinations made by this court based on the evidence of changed circumstances would permit this Court to make a *de novo* determination of the nature and scope of the appropriate sanction to be imposed and whether it is still appropriate for the sanction to be imposed jointly and severally on counsel and the plaintiff.

The Supreme Court has recognized that changed circumstances may be considered even on appeal, after entry of final judgment:

> We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And *in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered.* . . . We have said that to do so is . . . only to deal appropriately with a matter arising since [the] judgment and having a bearing upon the right disposition of the case. [Citations omitted].
>
> *Patterson v. Alabama*, 294 U.S. 600, 607, 55 S.Ct. 575, 578 (1935) (emphasis supplied).

If, as the Supreme Court has stated, it is proper for an *appellate* court to take note of changed circumstances in order to "do justice" *following* entry of a final judgment, it is clearly within the purview of a *trial* court to take note of them *prior* to the entry of such judgment and to act accordingly. In fact, the Supreme Court appears to have recognized this:

> Like the original district court judgment, the appellate mandate relates to the record and issues then before the court, and does not purport to deal with possible later events. Hence, the district judge is not flouting the mandate by acting on the motion [to set aside the judgment following an affirmance of that judgment]. [Citations omitted.]

Standard Oil Co. v. U.S., 429 U.S. 17, 18-19, 97 S.Ct. 31, 32 (1976)[5]

That principal should be applied in this case. It is respectfully requested that the Court, therefore, conduct a hearing and make a determination of what sanction is appropriate at *this* time and under the *current* circumstances.

2. Appropriate sanction

At this point, there is a question as to whether any monetary sanction is necessary to serve Rule 11's dual purposes of individual and general deterrence. As to individual deterrence, Mr. Schlanger has had his integrity, motivation, and professionalism questioned and has been publicly lambasted in the harshest possible terms by the Chief Judge of the Court of Appeals, has been the subject of considerable adverse publicity within the profession, has seen the Court of Appeals' opinion have a deleterious effect on his practice, has had to file bankruptcy (because, at least in part, the pendency of this proceeding precluded him from being able to refinance his debts), and has – beyond question – been deterred from filing litigation which might be considered controversial without exhaustive pre-filing research and documentation.

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[5] *See, also, e.g., Nguyen v. U.S.*, 792 F.2d 1500 (9th Cir., 1986) (permitting the district court to allow plaintiff to amend following an earlier remand made with directions to enter summary judgment for the defendant).

Given the publicity accorded to the Court of Appeals' opinion in this matter, the goal of general deterrence has certainly been served. The members of the Bar are now on notice that if they bring a suit of which the Court of Appeals disapproves, they can be subjected to massive monetary sanctions. This knowledge cannot but give attorneys pause and deter the filing of less-than-certain lawsuits without adequate pre-filing preparation.

Thus, both prongs of Rule 11's purpose have been served. The "piling on" of monetary sanctions at this point would be unnecessary to insure deterrence.

However, if this Court believes that the Court of Appeals' mandate nonetheless requires imposition of monetary sanctions, it is now free – given the additional evidence it will have concerning the deterrent effects to date – to re-examine the proper scope of the sanction. As all courts which have considered the issue have agreed, the amount of a monetary sanction should be only an amount sufficient to deter conduct violative of Rule 11.[6]

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[6] *See, e.g., Doering v. Union County Board of Chosen Freeholders*, 857 F.2d 191, 194 (3rd Cir., 1988) ("A district court's choice of deterrent is 'appropriate when it is the *minimum* that will serve to *adequately* deter the undesirable behavior.' ") and the cases and authorities cited therein; *White v. General Motors*, 908 F.2d 675, 684-85 (10th Cir., 1990) ("[T]he primary purpose of sanctions is to deter attorney and litigant misconduct, not to compensate the opposing party for its costs in defending a frivolous suit. *It is particularly inappropriate to use sanctions as a a means of driving certain attorneys out of practice.*" [emphasis supplied]); *In re Kunstler*, 914 F.2d 505, 522 (4th Cir., 1990) ("[T]he least severe sanction adequate to serve the purposes of Rule 11 should be imposed. . . . It is clear that Rule 11 should not blindly be used to shift fees." [citation omitted]); *Stewart v. American*

A determination of whether a sanction will be an effective deterrent (or whether sufficient deterrence has already been achieved) cannot be made without a factual determination of the circumstances which exist at the time of its imposition – both as to the specific circumstances of those involved (individual deterrence) and the impact any specific sanction will have on other members of the Bar (general deterrence).

This requires, at the least, a factual evaluation and determination (if monetary sanctions are deemed appropriate) of an ability to pay (since Rule 11 was not intended to impoverish attorneys and litigants, or to drive them into bankruptcy, but only to deter specific conduct)[7] and of the sanction's effect on the attorney's continued ability to practice.[8] Thus, this Court should grant this motion, conduct an evidentiary hearing, and determine the appropriate nature and scope of the sanction to be imposed.

Int'l Oil & Gas Co., 845 F.2d 196, 201-202 (9th Cir., 1988) ("The district court considered that although the full amounts appeared to be reasonable, a lesser amount was sufficient to get the attention of Meridian and deter it from further abuses. The imposition of sanctions was well within the sound discretion of the district court.")

[7] Mr. Schlanger will testify that if anything more than a very nominal monetary sanction were imposed it would be impossible for him to effectuate a feasible plan in his Chapter 11 proceeding and it would destroy him financially.

[8] *See, e.g., Doering*, 857 F.2d at 194-197; *In re Yagman*, 796 F.2d 1165, 1185 (9th Cir., 1986).

CONCLUSION

For all of the foregoing reasons, plaintiff's counsel's motion should be granted.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have, this 4th day of February, 1992, served all counsel of record with the foregoing

MOTION

by depositing a copy in the U.S. Mail in a envelope with sufficient postage affixed to insure delivery and addressed to:

Robert E. Hicks, Esq.
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Hicks, Maloof & Campbell
Suite 2200
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/s/ Herbert P. Schlanger
Herbert P. Schlanger
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